Supreme Court, U.S.
FILED
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(4)

NO. 99-1746

IN THE

SUPREME COURT OF THE UNITED STATES

WATERMAN STEAMSHIP CORPORATION

PETITIONER

VERSUS

HERBERT ANDERSON

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

THE SUPREME COURT OF THE STATE OF LOUISIANA

HERBERT ANDERSON NO. 1999-CC-3613

VS.

WATERMAN STEAMSHIP CORPORATION

IN RE: Waterman Steamship Corporation; - Defendant; Applying for Supervisory and/or Remedial writs, Parish of Orleans, Civil District Court Div. F, Nos. 97-7697; to the Court of Appeal, Fourth Circuit, No. 99-C-2866

February 18, 2000

Denied.

HTL
PFC
WFM
CDK
BJJ
JPV
JTK

TRAYLOR, J., not on panel.

Supreme Court of Louisiana
February 18, 2000

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX 2

No. 99-C-2866

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

HERBERT ANDERSON

versus

WATERMAN STEAMSHIP CORPORATION

In Re:	WATERMAN STEAMSHIP CORPORATION
Applying for:	SUPERVISORY WRIT
Directed to:	HONORABLE YADA MAGEE, JUDGE CIVIL DISTRICT COURT, PARISH OF ORLEANS DIVISION "F", 97-07697

WRIT DENIED

We find *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989) to be dispositive in this matter and thus affirm the trial court. *Williams* states that a Jones Act negligence claim may be brought against a privately owned and operated vessel that is time-chartered to the United States. Therefore, we deny the writ in regard to Plaintiff's claim under the Jones Act.

These facts differ from *Williams* in that Plaintiff also asserts maintenance and cure and unseaworthiness claims which give rise to *in rem* liability.[1]

A cursory reading of 46 U.S.C. 741 seems to imply that

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[1] *The Osceola,* 189 U.S. 158 (1903).

claims of maintenance and cure and unseaworthiness may not be brought against the Major Stephen Pless because it is "operated by or for the United States" and such ships cannot be "subject to arrest or seizure by judicial process." Nevertheless, the rationale of Section 741[2] is that the United States is made liable in personam via Section 742.

In this case factual questions remain as to whether the United States could be held liable to Plaintiffs in admiralty. For these reasons we deny the writ as concerns Plaintiffs claims of maintenance and cure and unseaworthiness.

New Orleans, Louisiana this 17th day of December, 1999.

s/s MEK
JUDGE MICHAEL E. KIRBY

s/s RJK
CHIEF JUDGE ROBERT J. KLEES

s/s RAK
JUDGE ROBERT A. KATZ

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[2] The exact language is: "in view of the provision herein made for a libel in personam." This language refers to Section 742.

APPENDIX 3

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

On September 3, 1999, a hearing was held on Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action and Defendant Waterman Steamship Corporation's Motion for Summary Judgment.

PRESENT: KURT P. FORSHAG, Attorney for Plaintiff Herbert Anderson;

JOHN R. FITZGERALD, Attorney for Defendant Waterman Steamship Corporation.

After considering the Motions, Memorandums and Exhibits filed by Defendant Waterman Steamship Corporation; *Plaintiff Herbert Anderson's Memorandum in Opposition to*

Defendant Waterman Steamship Corporation's Exception of No Right of Action or No Cause of Action; Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Motion for Summary Judgment; Plaintiff Herbert Anderson's Statement of Contested Material Facts; the Exhibits attached to Plaintiff's Memorandums, which were marked, filed, and introduced into evidence, and the argument of counsel, the Court made the following rulings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action are overruled;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Motion for Summary Judgment is denied.

JUDGMENT READ, AND SIGNED IN CHAMBERS THIS 24th DAY OF Sept., 1999, AT NEW ORLEANS, LOUISIANA.

s/s Yada T. Magee
JUDGE

APPENDIX 4

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

On September 3, 1999, a hearing was held on Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action and Defendant Waterman Steamship Corporation's Motion for Summary Judgment.

After considering the Motions, Memorandums and Exhibits filed by Defendant Waterman Steamship Corporation; *Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Exception of No Right of Action or No Cause of Action; Plaintiff Herbert Anderson's Memorandum in Opposition to Defendant Waterman Steamship Corporation's Motion for Summary Judgment; Plaintiff Herbert Anderson's Statement of Contested Material Facts;* the Exhibits attached to Plaintiff's Memorandums, which were marked, filed, and introduced into evidence, and the argument of counsel, the Court issues the following Reasons for Judgment:

On May 1, 1996, Plaintiff, Herbert Anderson, (hereinafter referred to as "Plaintiff"), was employed by Waterman Steamship Corporation, (hereinafter referred to as "Defendant"), as a Seaman and Assistant Cook Utility of the crew. Plaintiff was permanently assigned to a vessel in navigation which Plaintiff contends was being operated by his employer Defendant Waterman Steamship Corporation. The vessel was named the S.S. MAJOR STEPHEN W. PLESS.

On May 1st, 1996, Plaintiff was engaged in the course and scope of his employment aboard the S.S. MAJOR STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

Plaintiff alleges that on that date, an employee or employees of Waterman Steamship Corporation who was working on the boat on or about May 1, 1996, carelessly left an object or objects on the floor of the meat box of the galley, on the S.S. MAJOR STEPHEN W. PLESS, which caused Plaintiff Herbert Anderson to trip, slip, or otherwise fall over the object or objects on the floor and into a rack or shelf in the galley. Plaintiff alleges that he sustained injuries as a result of this accident. Plaintiff further alleges that he does not know the name of the person or persons who left the object or objects on the floor, but believes they were employees of Waterman.

In Plaintiff's *Petition for Damages* filed in this matter he has alleged that he has a right of action against Waterman, his employer, under both the general maritime law as well as in his capacity as a seaman. Plaintiff is making not only a Jones Act negligence claim, but also claims for unseaworthiness and maintenance and cure.

I. PLAINTIFF'S RIGHT OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

Defendant alleged in its Exception that "....by virtue of the exclusivity of liability provisions of the Suits in Admiralty Act, 46 USC §§ 741-745, Herbert Anderson has no cause of action and/or no right of action against Waterman Steamship Corporation."

(Defendant's Exception of No Right of Action or No Cause of Action, p. 1).

Defendant in its Memorandum in support of the exceptions contended that Plaintiff "....has no cause of action and no right of action against Waterman Steamship Corporation, since his exclusive remedy is against the United States." (Defendant's Memorandum in Support of Exception of No Right of Action or No Cause of Action, p. 1).

However, for the reasons to be discussed in the next section, the Court determines that Plaintiff does have a cause of action and a right of action against his employer Waterman Steamship Corporation for the injuries he alleges he suffered while working aboard the S.S. MAJOR STEPHEN W. PLESS.

The Louisiana Fourth Circuit Court of Appeal recently discussed the exception of no cause of action in *Dragon v. Cooper/T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006. In *Dragon, supra,* the Fourth Circuit stated that:

> The purpose of an exception of no cause of action is to determine the sufficiency in the law of the petition. The exception is triable on the face of the papers and for the purposes of determining the issues raised by the exception, the well pleaded facts in the petition must be regarded as true. *City of New Orleans v. Board of Com'rs,* 93-0690 (La. 7/5/94), 640 So.2d 237, 241. The standard for granting an exception of no cause of action is as follows:
>
> The burden of demonstrating that no cause of action has been stated is upon the mover or exceptor. In deciding the exception of no cause of action, the court must presume all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party. In reviewing a trial court's ruling sustaining an exception of no cause of action, the court of appeal and the {supreme} court should subject the

case to de novo review because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition.

In appraising the sufficiency of the petition we follow the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief. The question therefore is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief. The petition should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the petition to determine if the allegations provide for relief on any possible theory.

640 So.2d at 253 (citations omitted).

Id. at 98-1375, at pp. 2-3; 726 So.2d at 1007-1008.

In *Jefferson Downs Corp., Inc. v. Louisiana State Racing Commission,* 98-1229, 98-1230, 98-1231, (La. App.4th Cir.1/13/99), 727 So.2d 644, the Louisiana Fourth Circuit discussed the exceptions of no cause of action and no right of action. In *Jefferson Downs, supra,* the Court held that:

Exception of no cause of action

Although the procedural history and issues are complicated in this case, the fact remains that the only effect of Commission's rulings are to issue documents allowing Evangeline Downs to cause a referendum election in St. Landry Parish. However, review of the pleadings, in light of the applicable Louisiana state law, reveals that the trial court

correctly dismissed the petition for judicial review on the exception of no cause of action.

The applicable law on this issue has recently been summarized by the Louisiana Supreme Court in *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission,* 94-2015 (La. 11/30/94), 646 So.2d 885, a case cited by Livingston Downs, as follows:

> An action can only be brought by a person having a real and actual interest which he asserts. La. Code Civ. Proc. Art. 681. The exception of no right of action is designed to test whether the plaintiff has a real and actual interest in the action. La. Code Civ. Proc. Art. 927 (5). The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Babineaux v. Pernie-Bailey Drilling Co.,* 261 La. 1080, 262 So.2d 328 (1972). The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation....

Id. at 98-1229, 98-1230, 98-1231, p. 6; 727 So.2d at 646-647. (Citation omitted).

The Court finds that from the allegations in Plaintiff's *Petition* filed into the record in this matter, as well as the applicable law on this issue, that Herbert Anderson has a real and actual interest in this action. He fits within the class of persons to whom the law grants the causes of action asserted in his *Petition for Damages*. Thus, Defendant Waterman Steamship Corporation's Exception of No Right of Action is overruled.

II. PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT WATERMAN STEAMSHIP CORPORATION.

The initial inquiry is what law governs in a maritime personal injury case such as the one at bar. The Louisiana Supreme Court in *Prejean v. Industrial Cleanup, Inc., et al,* 98-0948 (La. 12/1/98), 721 So.2d 1273, stated that: "....State courts must apply the same law to a maritime claim that a federal court would apply had the case been filed in federal court. 1 *Benedict on Admiralty* (MB) § 112 (7th ed. 1998)". *Id.* at 98-0948 at p. 9; 721 So.2d at 1278.

In *Dragon v. Cooper/T. Smith Stevedoring Company, Inc.*, 98-1375 (La. App. 4th Cir. 1/6/99), 726 So.2d 1006, cited earlier in these Reasons for Judgment, the Louisiana Fourth Circuit Court of Appeal stated that:

> State courts exercising maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United States Supreme Court maritime jurisprudence. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So.2d 89, 94....
>
> *Id.* at 98-1375 at p. 7; 726 So.2d at 1009.

In *Holmes v. Daybrook Fisheries, Inc.*, 98-1824 (La. App. 4th Cir. 2/24/99), 730 So.2d 1006, *writ application pending*, 99-C-1571 (filed June 1, 1999), the Fourth Circuit stated that:

> Admiralty claims may be brought in federal court pursuant to its admiralty jurisdiction or in state court under the savings to suitors clause; in either case, federal substantive maritime law applies....

Id. at 98-1824 at pp. 2-3; 730 So.2d at 1008. (Citation omitted).

The United States Fifth Circuit Court of Appeal discussed the very issue raised by Defendant in their no cause of action exception, in *Williams v. Central Gulf Lines,* 874 F.2d 1058 (5th Cir. 1989), *cert denied,* 493 U.S. 1045, 110 S.Ct. 843, 107 L.Ed.2d 837 (1990).[3] In *Williams, supra,* Ballard Williams, a seaman who was employed by Central Gulf Lines, aboard its vessel the S/S Bay became ill while on board, and after being transferred to a hospital, subsequently died. The representative of his estate, Williams, filed suit against Central Gulf pursuant to the general maritime law and the Jones Act, 46 U.S.C. § 688, alleging various acts of negligence. *Id.* at 1059.

The Fifth Circuit described the procedural events leading up to the appeal as follows:

> During discovery it was revealed that, at the time of Ballard's death, the S/S Bay was

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[3] The Louisiana Supreme Court in *Vendetto vs. Sonat Offshore Drilling Co.,* 97-3103 (La. 1/20/99); 725 So.2d 474, *rehearsing denied,* _____ So.2d _____, 97-3103 (La. 2/12/99), *U.S. cert den.* _____ U.S. _____, 119 S.Ct. 2369, 2370 (1999), discussed by Plaintiff in his memorandum, when discussing a recent maritime federal Fifth Circuit case, noted that they were "not bound by the Fifth Circuit's decision...." *Id.* at 97-3103, at p. 9; 725 So.2d at 478-479. Thus, while technically this state court may not be bound by federal Fifth Circuit law, the Court finds that the Fifth Circuit's reasoning is persuasive authority for this Louisiana State court, and thus adopts it.

> under a time charter to the United States for use by the Military Sealift Command, an agency of the Department of the Navy. Central Gulf moved for summary judgment or, alternatively, to dismiss on the grounds that, pursuant to the Suits in Admiralty Act's exclusivity provision, the plaintiff's sole remedy was a claim against the United States. The district court agreed with Central Gulf's interpretation of the Suits in Admiralty Act and because the United States had not been named as a party-defendant, dismissed the suit. The appellant since filed a timely notice of appeal.
>
> *Id.* at 1059.

The Suits in Admiralty Act as discussed by the Court in *Williams, supra,* in pertinent part provides as follows:

> **§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims**
>
> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim:...
>
> 46 U.S.C.A. § 745 (West 1975).

In *Williams, supra,* the Defendant Central Gulf argued on appeal that since the Public Vessels Act or alternatively, the Suits in Admiralty Act provided a remedy for Plaintiff against the United

States, that Section 745, thus operated as a bar to Plaintiff's claim against Central Gulf. *Id.* 874 F.2d at 1060. The Fifth Circuit however after carefully examining legislative history, as well as the relevant case law, concluded that neither the Suits in Admiralty Act nor the Public Vessels Act provided a remedy to Plaintiff against the United States under the facts present in *Williams,* and thus, "that the exclusivity provision, therefore, does not bar suit against Central Gulf." *Id.*

The Court in *Williams,* next extensively discussed the Suits in Admiralty Act. In *Williams, supra,* the Court discussed this issue as follows:

> **IV. THE SUITS IN ADMIRALTY ACT**
>
> The exclusivity provision may bar the appellant's suit against Central Gulf "where a remedy {against the United States} is provided by {the Suits in Admiralty Act}." 46 U.S.C. App. § 745. As mentioned above, this court recognized that the provisions of the Suits in Admiralty Act do not themselves *provide* a remedy. Rather, the Act merely acts to waive the United States immunity so as to furnish a "jurisdictional hook on which to hang a traditional admiralty claim." *Trautman,* 693 F.2d at 444. In light of *Trautman,* we view the issue of whether a remedy against the United States *is provided* by the Suits in Admiralty Act as entailing a two part inquiry. First, we must ask whether the United States has consented to suit given the facts at hand. This is the "jurisdictional hook" inquiry and involves applying the Act's statutory language to the present circumstances. If a jurisdictional hook is found to exist, we must then ask whether the party attempting to invoke the exclusivity provision as a defense to suit has shown that "a traditional admiralty claim" could

have been stated against the United States. Only by satisfying this two part test can it be concluded that "a remedy is provided by {the Suits in Admiralty Act}" so as to justify barring plaintiffs from bringing suit against private entities such as Central Gulf.

A. The "Jurisdictional Hook" Inquiry

As discussed, Central Gulf owned the S/S Bay, the vessel on which Ballard became ill. Pursuant to a written agreement, Central Gulf time chartered the vessel to the United States but retained possession and control of the vessel's day-to-day operations. *See supra* Articles 31 and 22(a) of the charter agreement. The United States controlled the cargoes carried and ports of call and destination to which the vessel sailed.

Based on these relationships, Central Gulf argues that the Suits in Admiralty Act functions to waive the United States' sovereign immunity thus establishing a jurisdictional hook. We agree....

****

In view of the 1960 amendment, if a proceeding in admiralty could be asserted against a private person in the Government's position, then the Suits in Admiralty Act will provide a jurisdictional hook on which to hang a claim against the Government. Had a private person time chartered the S/S Bay, we are persuaded that, based on notions of operational control, such persons could be subject to suit for the negligence alleged herein. Thus, by operation of the 1960 amendment to the Suits in Admiralty Act, the Government, under the present circumstances, has consented to suit as if a private person were involved.

B. The "Traditional Admiralty Claim" Inquiry

The Suits in Admiralty Act will not "provide a remedy" as envisioned by section 745's exclusivity provision unless, when the action arose, principles of maritime law would have allowed the appellant to state a claim against a private person in the same position as the Government, i.e. against a private time charterer. This Circuit's general rule is that a time charterer " 'who has no control over the vessel, assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise.' " *P&E Boat Rentals, Inc. v. Ennia General Insurance Co., Inc.*, 872 F.2d 642, 647 (5th Cir. 1989) (quoting *Mallard v. Aluminum Co. of Canada, Inc.*, 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981)). *See also* M.J. Norris, *The Law of Maritime Personal Injuries 3d*, § 130 (1987). The term "control" as used by this court in formulating this general rule refers to operational control of the vessel, not ultimate control of its destination or cargos.

Article 22(a) of the present charter agreement patently states that '[t]he Master of the Vessel...shall not be under the direction of the Charterer as regards navigation, care and custody of the Vessel and care of the cargo." We find that, by operation of this provision, the United States acquired no operational control over the vessel. Although the charter provides that the United States shall bear certain costs, responsibility for costs "in and of itself does not transfer operational responsibility from the owner." *Mallard*, 634 F.2d at 242 n. 5. Indeed, "this circuit seems reluctant to find any shift of operational responsibility

for personal injuries to the time charterer absent clear language to that effect." *Id.* The charter contains no clear language whereby the United States assumes responsibility for the vessel's operations or for the personal injuries caused by the negligence of the crew. We therefore hold that operational control did not shift from Central Gulf to the United States and that, given the specific facts at hand, the appellant would have been unable to state a claim against the United States as time charterer.

V. CONCLUSION

Application of our two part inquiry indicates that the second prong, i.e. the existence of a traditional admiralty claim prong, has not been met. Because a jurisdictional hook alone does not suffice to "provide a remedy" under the Suits in Admiralty Act, section 745's exclusivity provision does not operate to bar suit against Central Gulf. We therefore, VACATE the dismissal of the appellant's claims and REMAND for proceedings not inconsistent with this opinion.

Id. at 1061-1063. (Emphasis added).

The Court finds the reasoning in *Williams, supra,* to be persuasive and adopts the "operational control" test in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further adopts Plaintiff's argument that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure. *See Also: Favorite v. Marine Personnel and Provisioning, Inc.*, 955 F.2d 382, 384-385, 388 (5th Cir. 1992); *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 441-444 (5th Cir. 1982); *Servis v. Hiller Systems Inc.*, 54

F.3d 203, 208 (4th Cir. 1995), *cert. den.*, 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996); *Morales-Melendez v. Steamship Mut.*, 763 F. Supp. 1174, 1175-1176, 1179-1180 (D. Puerto Rico 1991); *Nakano v. United States of America and Vessel Charters, Inc.*, 1988 AMC 2220, (U.S.D.C. So. Dist. Cal. 1988); *Nelson v. Research Corp. Of University of Hawaii*, 805 F. Supp. 837, 846-848 (D. Hawaii 1992).

The Court further finds that several of the cases cited by Defendant Waterman: *Pineiro v. United States*, 65 F. Supp. 191 (Dist. Ct., N.D. Cal.,S.D. 1945); *Burkholder v. United States*, 60 F. Supp. 700 (Dist Ct., E.D. Penn. 1945) (On Reargument); *Epstein v. United States*, 86 F. Supp. 740 (U.S.D.C., S.D. N.Y. 1949); and *Western Tankers Corporation v. United States*, 1975 AMC 775 (U.S.D.C., S.D. N.Y. 1975), appear to use an "operated by or for" test to determine whether or not the exclusivity provisions of the Suits in Admiralty Act applies.

The Court however, as stated earlier, agrees with Plaintiff that the more modern "operational control" test should be used in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies. That is who was in charge of the day to day operations of the vessel where the plaintiff was injured.

The Court further finds that based on Plaintiff's exhibits, that in the case at bar, the United States is a time charterer pursuant to a Time Charter Party, between WTAK-3, Inc. Contractor, and the United States of America, Charterer, entered into as of January 14, 1983, amended and restated as of May 1, 1985.

The Court finds that in considering the arguments of Plaintiff, he has demonstrated through his pleadings, his memorandums and the exhibits attached thereto, as well as his Petition for Damages, Statement of Contested Material Facts, and all other pleadings and exhibits on file in the record of this matter, that he has set forth specific facts showing that Plaintiff has sued the right party and that his action against his employer Waterman Steamship Corporation is not barred by the exclusivity of liability provisions of

the Suits in Admiralty Act, and thus, Defendant's Exception of No Cause of Action is overruled.

III. SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS MATTER.

As stated earlier, the Court adopts Plaintiff's argument that the test used by the Courts and more particularly the Federal Fifth Circuit, in determining whether or not the exclusivity provisions of the Suits in Admiralty Act applies, is "operational control". That is who was in charge of the day to day operations of the vessel where the plaintiff was injured. The Court further finds that this test is used regardless of whether or not the injured seaman is making Jones Act negligence claims or those as well as traditional admiralty claims, such as unseaworthiness and claims for maintenance and cure.

For the purposes of Defendant's motion for summary judgment, it is significant that the federal Fifth Circuit in *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982), indicated that the question of whether or not the Government exercised sufficient operational control of the vessel, to be held liable for an injured Plaintiff's injuries, is a question of fact.

In *Trautman, supra,* the Fifth Circuit explained this as follows:

> We must now turn to appellant's substantive arguments relating to whether Steber was an agent of the United States and/or whether the United States was in sufficient operational control of Steber's activities in order to cause the United States to be liable under the Jones Act, 46 U.S.C. § 688, for the negligence of Steber which caused or contributed to appellant's injuries. Appellant contends that the combination of Boyd's visits to the barge, the contract change for the work on the Mecca, and the designation of the civilian members of the operation as part of the "Force" in the Egyptian/United States agreement is sufficient to demonstrate that Steber was an agent of the

> United States and/or under its operational control. Although appellant couches this argument in terms of an improper determination of the legal standards to be applied, we believe that the question is really one of fact to which our review is limited to the clearly erroneous standard as announced in *McAllister, supra.*

Id. at 445, (emphasis added). [4]

The Louisiana Fourth Circuit Court of Appeal recently discussed the standard for evaluating summary judgments in *Davis v. Bd. Of Supervisors of La. State University et al,* 97-0382 (La. App. 4th Cir. 3/18/98), 709 So.2d 1030, *writ denied,* 98-C-1329 (La. 6/26/98), 719 So.2d 1288. In *Davis supra,* the Fourth Circuit held that:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion requires him only to point out to the court that there is an

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[4] Buck Steber, Inc., (Steber), hired Appellant Trautman as one of the divers to carry out its part of a subcontract involving diving services necessary for the removal of sunken vessels in the Suez Canal. *Id.* at 442.

absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966 C(2).

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; *Townley v. City of Iowa,* 97-493 (La. App. 3 Cir. 10/29/97); 702 So.2d 323, 326.

The amended article 966 substantially changes the law of summary judgment. Under the prior jurisprudence, summary judgment was not favored and was to be used only cautiously and sparingly. The pleadings and supporting documents of the mover were to be strictly scrutinized by the court, while the documents submitted by the party in opposition were to be treated indulgently. Any doubt was to be resolved against granting summary judgment, and in favor of trial on the merits. *Sassone v. Elder,* 626 So.2d 345 (La. 1993). The jurisprudential presumption against granting the summary judgment was legislatively overruled by La. C.C.P. art. 966 as amended. The supporting documentation submitted by the parties is to scrutinized equally and the overriding presumption in favor of trial has been deleted. Once the motion for summary judgment has been properly supported by the mover, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting ofthe motion. The amendment

> to La. C.C.P. art. 966 brings Louisiana's standard for summary judgment closely in line with the federal standard under Fed. Rule Civ. Proc. 56(c)....
>
> ****
>
> In construing the federal summary judgment rule, the United States Supreme Court held that summary judgment shall be granted where the evidence is such that it would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). If a defendant in an ordinary civil case moves for summary judgment or a directed verdict based on the lack of proof of a material fact, the judge must ask himself whether a fair-minded jury could return a verdict for the non-moving party on the evidence presented. *Id.* The *Anderson* court further held that the mere existence of a scintilla of evidence on the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find for that party....
>
> *Id.* at 97-0382 at pp. 7-9; 709 So.2d at 1033-34. (String citations omitted).

The Louisiana Fifth Circuit Court of Appeal recently discussed what constitutes a "material fact". In *Azreme, Corp. v. Esquire Title Corp.*, 98-1179 (La. App. 5th Cir. 3/30/99), 731 So.2d 422, the Fifth Circuit stated that:

> . . . . The amended version of LSA-C.C.P. art. 966 now proclaims that the summary

judgment procedure is favored and shall be construed to accomplish the ends of just, speedy, and inexpensive determination of allowable actions. *Tonubbee v. River Parishes Guide,* 97-440 (La. App. 5th Cir. 10/28/97), 702 So.2d 971. The plaintiff filed the summary judgment motion in this case. Under the amended version of LSA-C.C.P. art. 966, the burden of proof remains on the mover to show "that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." *Id.* at 974. A material fact is one that would matter on the trial of the merits. *J.W. Rombach, Inc. v. Parish of Jefferson,* 95-829 (La. App. 5th Cir. 2/14/96), 670 So.2d 1305. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. *Id.* at 1308.

****

. . . . If the supporting documents produced by the mover are sufficient to resolve all material fact issues, then the burden of proof shifts to the opposing party to present evidence that material facts are still in dispute. *Herman v. Rome,* 95-666 (La. App. 5th Cir. 1/17/96), 668 So.2d 1202. If the supporting documents are not sufficient to resolve all material fact issues, summary judgment must be denied. *Id.*

Id. at 98-1179, at pp. 5-6; 731 So.2d at 425, (emphasis added).

The Court adopts Plaintiff's argument that there are disputed issues of material fact and law as to the following, such that summary judgment is inappropriate in this matter:

1. There are disputed issues of material fact as to who had operational control of the S.S. MAJOR STEPHEN W. PLESS, such that summary judgment is inappropriate.

2. There are disputed issues of material fact as to whether or not the overall operational control of the S.S. MAJOR STEPHEN W. PLESS, remained at all times the responsibility of Defendant Waterman Steamship Corporation, such that summary judgment is inappropriate.

3. There are disputed issues of material fact as to whether or not the intent of the parties is to place Defendant Waterman with responsibility for its employees and for any personal injuries which Waterman employees sustain while carrying out their duties, such that summary judgment is inappropriate.

4. There are disputed issues of material fact and law as to whether or not the United States has agreed to accept "operational responsibility for personal injuries" of Waterman employees like Plaintiff Herbert Anderson such that summary judgment is inappropriate.

5. There are disputed issues of material fact and law as to whether or not the operator of the S.S. MAJOR STEPHEN W. PLESS, Waterman, remains responsible and liable for the personal injuries of its employees, like Plaintiff Herbert Anderson, such that summary judgment is inappropriate.

6. There are disputed issues of material fact and law as to whether or not the fact that the Government may have directed the destination of the vessel or the ultimate destination of the cargo of the S.S. MAJOR STEPHEN W. PLESS, constitutes the kind of operational control necessary to overcome the clear terms of the operating contract, and shift liability for Plaintiff's personal injuries from his employer Waterman to the United States. Thus, summary judgment is inappropriate.

CONCLUSION

For the reasons discussed in these *Reasons for Judgment,* the Court makes the following rulings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Exceptions of No Right of Action and No Cause of Action are overruled;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant Waterman Steamship Corporation's Motion for Summary Judgment is denied.

REASONS FOR JUDGMENT READ, AND SIGNED IN CHAMBERS THIS 7th DAY OF OCTOBER, 1999, AT NEW ORLEANS, LOUISIANA.

s/s Yada T. Magee
JUDGE

APPENDIX 5

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-7697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____
DEPUTY CLERK

PETITION FOR DAMAGES

NOW INTO COURT, through undersigned counsel plaintiff Herbert Anderson, a person of the full age of majority, a resident and domiciliary of the Parish of Orleans, State of Louisiana, respectfully represents:

I.

Made defendant herein is Waterman Steamship Corporation, a foreign corporation, authorized to do and/or actually doing business in the Parish of Orleans, State of Louisiana, and within the jurisdiction and venue of this Honorable Court.

II.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was employed by defendant, Waterman Steamship Corporation, as a Seaman and Assistant Cook Utility of the crew and permanently assigned to a vessel or fleet of vessels in navigation that were owned and operated by defendant Waterman Steamship Corporation, which vessels include the S.S. MAJ. STEPHEN W. PLESS.

III.

At all times pertinent herein, including on or about May 1, 1996, petitioner, Herbert Anderson, was engaged in the course and scope of his employment aboard the MAJ. STEPHEN W. PLESS, a vessel in navigation upon the navigable waters of the United States.

IV.

On or about May 1, 1996, petitioner was caused by defendant to sustain injuries to his psyche and body as a result of the negligent acts of defendant, and its agents, servants, employees, and the unseaworthiness of the vessels under its custody and control.

V.

On or about May 1, 1996, petitioner, while employed as an Assistant Cook Utility aboard the S.S. MAJ. STEPHEN W. PLESS, was working in the meat box of the galley with the steward when he was caused to trip, slip or otherwise fall over an object on the floor and into a rack or shelf in the galley.

VI.

As a result of the foregoing accident, petitioner was caused to sustain injury to his shoulder and back, including but not limited to, a disc injury and possible tendon perforation of the right shoulder, as well as other parts of his body, the full residuals of such injuries are unknown but severe.

VII.

Following the accident, defendant paid petitioner maintenance and cure benefits for a period of time. However, defendant terminated payment of those benefits without lawful authority

and despite demand, has arbitrarily and capriciously failed and/or refused to reinstate payment of plaintiff's maintenance and cure benefits.

VIII.

Pursuant to the subject matter of this lawsuit as set forth herein, defendant is liable to petitioners as follows:

IX.

COUNT ONE

The aforesaid injuries to the petitioner were directly and proximately caused by the negligent acts of commission and/or omission on the part of defendant Waterman Steamship Corporation including, but not limited to, defendant's failure to provide petitioner, as its employee, with a reasonably safe place to work, and failure to assign petitioner to a seaworthy vessel or fleet of vessels, its failure to warn petitioner of impending dangerous perils, its failure to provide petitioner with sufficient assistance from crewmembers which would have enabled him to perform his assigned work with a reasonable degree of safety, failure of its superior officers to supervise or to be attentive with respect to the operation underway at the time petitioner was injured, and other negligent acts of commission and/or omission as will be shown at the trial of this matter.

X.

SECOND COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove, additionally, and/or in the alternative, alleges that defendant Waterman Steamship Corporation, is liable to petitioner under the General Maritime Law for breach of the warranty of seaworthiness, extending to the vessel or vessels involved herein, including but not limited to, the S.S. MAJ. STEPHEN PLESS. The aforesaid injuries suffered by the petitioner

were also directly and proximately caused by the unseaworthiness of the defendant's vessels, including but not limited to, the defendant subjecting petitioner to injury as a result of an inadequate and/or incompetent crew and its failure to furnish the tools, coworkers, or equipment necessary for petitioner to perform his duties in a reasonably safe manner, all which caused the injuries sustained by petitioner.

XI.

THIRD COUNT

In addition, petitioner, while reiterating and realleging each and every allegation made hereinabove, alleges that he was injured performing work as a Seaman and as a member of the crew of a vessel and/or vessels in the employment of Waterman Steamship Corporation, and sustained the injuries complained of in the service of the vessel and/or vessels, so as to be entitled to maintenance and cure, both past and future, until such time as he in fact reaches maximum cure, as well as entitlement to damages and attorney's fees for defendant's arbitrary and capricious termination of his maintenance and cure.

XII.

FOURTH COUNT

Petitioner, reiterating and realleging each and every allegation made hereinabove, additionally alleges that as a result of defendant's refusal to provide maintenance and cure, petitioner's injuries have worsened, his ultimate physical recovery has been delayed, and he has been caused to suffer pain and mental anguish that he otherwise would not have incurred.

XIII.

As a direct result of the aforesaid incident and the negligence of the defendant Waterman Steamship Corporation, as well as the unseaworthiness of the defendant's vessels and defendant's refusal to furnish maintenance and cure to petitioner, Herbert Anderson, has suffered severe physical pain and keen mental anguish, has undergone medical treatment, has lost substantial sums of money he otherwise would have earned, has been disabled from and/or severely handicapped in his pursuit of gainful employment and other daily activities, and these conditions may continue, worsen, or become permanent in time, and the full residuals may be severe; all of which entitles petitioner to all damages which are reasonable under the circumstances for past, present and future pain, suffering and mental anguish; disability; past and future loss of wages, including impairment of earning capacity; past and future medical expenses; past and future maintenance; and lost {sic} of life's pleasures. Petitioner's claims exceed the requisite amount for this court's subject matter jurisdiction.

XIV.

Petitioner's injuries and resulting damages were legally and proximately caused by the fault, including the negligence, of the defendant, its officers, agents, employees, and those for whom it is legally responsible, as well as by reason of the unseaworthiness of the S.S. MAJ. STEPHEN W. PLESS. The claims against defendant are asserted by petitioner as a seaman under the Jones Act, 46 U.S.C. § 688, under the substantive provisions of the general maritime law of the United States, including the warranty of seaworthiness, which has been breached by defendant herein, and under any other federal or state statute which may be applicable. The jurisdiction of this court is premised on the "savings to suitors" clause. In the alternative, and only in the alternative, that petitioner is held not to be a seaman within the meaning of the Jones Act, petitioner alleges that he is entitled to recover from defendant for negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act and/or the law of the State of Louisiana.

XV.

Petitioner prays that he be declared a Seaman by this Court.

XVI.

Petitioner is entitled to and prays for a trial by jury.

WHEREFORE, petitioner, Herbert Anderson, respectfully prays that defendant be served with a copy of this petition and be duly cited to appear and to answer, and that, after legal delays and due proceedings had, there be judgment herein in favor of petitioner, Herbert Anderson, and against defendant, Waterman Steamship Corporation, for all damages as are reasonable under the premises. Petitioner additionally prays for such amounts as the court may deem fit for continuing maintenance and cure payments and attorney's fees and petitioner further prays for legal interest on all said amounts, including prejudgment interest, until paid in full, as well as for the full costs and disbursement of these proceedings, and all general and equitable relief as the court may deem appropriate herein.

Respectfully submitted,

GAINSBURGH, BENJAMIN, DAVID MEUNIER, NORIEA AND WARSHAUER

BY: s/s Jeffery A. Mitchell
NICK F. NORIEA, JR. # 10036
JEFFERY A. MITCHELL, # 19711

PLEASE SERVE:

Waterman Steamship Corporation
through its agent for service of process
George Denegre
201 St. Charles Ave.
50th Floor
New Orleans, La. 70170

APPENDIX 6

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 97-07697 DIVISION: "F" (10)

HERBERT ANDERSON

VERSUS

WATERMAN STEAMSHIP CORPORATION

FILED: _____

DEPUTY CLERK

EXCEPTION AND ANSWER

NOW INTO COURT, through undersigned counsel, comes defendant, Waterman Steamship Corporation, and answers the Petition for Damages of Herbert Anderson as follows:

EXCEPTION

The Petition for Damages fails to state a claim or cause of action upon which relief can be granted.

ANSWER

AND NOW, answering the particular allegations of said Petition for Damages, Waterman Steamship Corporation responds as follows:

I.

The allegations of Paragraph I are denied for lack of sufficient information to justify a belief as to their truth and veracity.

II.

The allegations of Paragraph II are denied for lack of sufficient information to justify a belief as to their truth and veracity.

III.

The allegations of Paragraph III are denied for lack of sufficient information to justify a belief as to their truth and veracity.

IV.

The allegations of contained in Paragraph IV of the Petition for Damages are denied.

V.

The allegations of Paragraph V of the Petition for Damages are denied.

VI.

The allegations of Paragraph VI of the Petition for Damages are denied.

VII.

Waterman Steamship Corporation admits that it paid Petitioner maintenance and cure benefits for a period of time; however, the remainder of the allegations of said Paragraph VII are denied.

VIII.

The allegations contained in Paragraph VIII of the Petition for Damages are denied.

IX.

The allegations contained in Paragraph IX of the Petition for Damages are denied.

X.

The allegations contained in Paragraph X of the Petition for Damages are denied.

XI.

The allegations contained in Paragraph XI of the Petition for Damages are denied.

XII.

The allegations contained in Paragraph XII of the Petition for Damages are denied.

XIII.

The allegations contained in Paragraph XIII of the Petition for Damages are denied.

XIV.

The allegations contained in Paragraph XIV of the Petition for Damages are denied.

XV.

The allegations contained in Paragraph XV require no response from this defendant, however, to the extent a response is deemed required, the allegations are denied.

XVI.

The allegations contained in Paragraph XVI require no response from this defendant, however, to the extent a response is deemed required, the allegations are denied.

AFFIRMATIVE DEFENSES

Waterman Steamship Corporation respectfully submits the following affirmative defenses and reserves its right to submit additional affirmative defenses as discovery is undertaken and additional facts become known.

XVII.

Plaintiff's injuries, if any, were caused solely through his own fault and neglect in failing to follow safe practices reasonably available and known to him. Said fault and neglect serves as a complete bar to or in diminution of any claims plaintiff may have against defendant herein.

XVIII.

Plaintiff's injuries, if any, were caused solely through the fault and neglect of plaintiff and/or others for whom Waterman Steamship Corporation cannot be held legally responsible.

XIX.

Plaintiff has failed to mitigate his damages as required by law and as a result of his failure to mitigate damages, plaintiff is barred from pursuing any claims for loss or diminution of wage earning capacity.

XX.

Plaintiff has received the appropriate maintenance

and cure and he is not entitled to further maintenance and cure.

XXI.

Plaintiff has reached maximum medical improvement from any injuries that he allegedly sustained while in the employ of Waterman Steamship Corporation and he is not entitled to further maintenance and cure.

XXII.

To the extent plaintiff's claims, if any, exceed the value of any vessel owned by defendants, Waterman Steamship Corporation reserves its right to seek limitation under all federal laws entitling it to exoneration from and/or limitation of liability.

XXIII.

Waterman Steamship Corporation avers that any injuries sustained by plaintiff were caused by risks incident to his alleged employment which risks were assumed by the plaintiff and for which Waterman Steamship Corporation is neither responsible nor liable.

WHEREFORE, Waterman Steamship Corporation prays that this its Answer be deemed good and sufficient, and that after due proceedings are had that there be judgment rendered herein in favor of Waterman Steamship Corporation and against the plaintiff, Herbert Anderson, dismissing the plaintiff's Petition for Damages with prejudice at plaintiff's costs and for all further general and equitable relief.

Respectfully submitted,

s/s Wayne G. Zeringue, Jr.

WAYNE G. ZERINGUE, JR.
(#18516)
Jones, Walker,
Waechter, Poitevent, Carrere
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201 St. Charles Ave. – 48th Floor
New Orleans, Louisiana 70170-5100
Telephone: (504) 582-8682
Attorney for Waterman Steamship
Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been properly mailed to all counsel of record on this 19th day of May 1997.

s/s Wayne G. Zeringue, Jr.

WAYNE G. ZERINGUE, JR.

APPENDIX 7

28 U.S.C.A. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C.A. § 1257 (West 1993).

APPENDIX 8

46 U.S.C.A. § 741

§ 741. Exemption of United States vessels and cargoes from arrest or seizure

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no

cargo owned or possessed by the United States or by such corporation, shall after March 9, 1920, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Canal Commission.

46 U.S.C.A. § 741 (West Supp. 1999).

APPENDIX 9

46 U.S.C.A. § 742

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

46 U.S.C.A. § 742 (West Supp. 1999).

APPENDIX 10

46 U.S.C.A. § 745

§ 745. Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest.

46 U.S.C.A. § 745 (West 1975).

APPENDIX 11

Louisiana Code of Civil Procedure **art. 966**

Art. 966. Motion for summary judgment; procedure

A. (1) The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

(2) The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure is favored and shall be construed to accomplish these ends.

B. The motion for summary judgment and supporting affidavits shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.

C. (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.

(2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

D. The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.

E. A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.

F, G. Repealed by Acts 1997, No. 483, § 3, effective July 1, 1997.

Louisiana Code of Civil Procedure art. 966 (West Supp. 2000)

APPENDIX 12

***Louisiana Code of Civil Procedure* art. 968**

Art. 968. Effect of judgment on pleadings and summary judgment

Judgments on the pleadings, and summary judgments, are final judgments and shall be rendered and signed in the same manner and with the same effect as if a trial had been had upon evidence regularly adduced. If the judgment does not grant mover all of the relief prayed for, jurisdiction shall be retained in order to adjudicate on mover's right to the relief not granted on motion.

An appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment.

Louisiana Code of Civil Procedure art. 968
(West 1984)

APPENDIX 13

28 U.S.C.A. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S.C.A. § 1333 (West 1993).

APPENDIX 14

46 U.S.C.A. § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of

the United States at the time of the incident giving rise to the action if the incident occurred-

> **(A)** while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources-including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> **(B)** in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person-

> **(A)** under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

> **(B)** under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

46 U.S.C.A. § 688 (West Supp. 1999).

Respectfully submitted,

Kurt P. Forshag

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